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File No. 80-1862

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1980

ALICE J. WILLIAMS,
Appellant,

-vs-

ESTHER V. KRUEGER,
Appellee

ON APPEAL FROM THE SUPREME COURT OF MICHIGAN

APPELLEE'S MOTION TO DISMISS APPEAL AND/OR AFFIRM JUDGMENT

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IN THE SUPREME COURT
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APPELLEE'S MOTION TO DISMISS APPEAL AND/OR AFFIRM JUDGMENT

Now comes Esther V. Krueger, Appellee by and through her attorneys Church, Wyble, Kritselis, Anderson & Robinson, P.C. and hereby moves the Court pursuant to Supreme Court Rule 16 to dismiss the appeal and/or in the alternative to affirm the judgment sought to be reviewed and states as follows:

1. The present appeal seeks to reverse a decision of the Michigan Supreme Court holding that a Trial Judge has the authority to determine on a case by case basis whether or not to exercise its discretion and allow some means of substituted service other than those specifically set forth in the local Court Rule which would comport with the due process requirements of notice guaranteed under the 14th Amendment.

2. The issue sought to be reviewed does not present a substantial Federal question because the method of substituted service authorized in this case is limited to its particular facts. The Court did not allow similar service in any or all cases to be presented in the future, but required each case to be decided individually on its own facts. The trial court must be satisfied that the plaintiffs have shown with particularity that service of process could not reasonably be made according to any prescribed method and that "no better alternative means of giving notice were available" other than the manner being requested before it can exer-

cise discretion and allow service. In the consolidated case of *Rodgers* v *Davis*, 410 Mich 144, 300 NW 2d 910 (1981) the Court reversed authorized service by publication holding that the trial court improperly exercised its discretion without requiring a factual affidavit showing exhaustion of all other means of service.

3. The issue sought to be reviewed concerns only notice and not jurisdiction and as such presents insubstantial issues which need no further argument. This Court has repeatedly held, since *Mullane* v *Central Hanover Bank & Trust Co*, 330 US 306, 70 S Ct 652, 94 L Ed 865 (1950), that due process does not in all cases require actual notice. All that is required is the means best calculated to give actual notice. To accept appellant's assertions, actual notice would be required in all cases and where the defendant could not be found as in the present case, litigation could not proceed. Such a ruling would be manifestly inconsistent with numerous decisions of this Court and the many Federal and State Courts which have relied upon those decisions fashioning procedural rules for service of process to protect the State's interest in providing a means of civil redress for injured citizens.

Wherefore, Appellee requests this Court to grant her Motion to Dismiss the Appeal or in the alternative to Affirm the Judgment of the Michigan Supreme Court and award her costs to be taxed.

Respectfully submitted,
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LAW AND ARGUMENT

I. SUBSTITUTED SERVICE UPON APPELLANT'S INSURER WAS NOT AUTHORIZED AS THE ONLY MEANS OF NOTICE NECESSARY.

The issue presented to this Court does not concern the jurisdiction of the State of Michigan over the defendant whether *in personam* or *in rem*. Contrary to Appellant's assertions, the service of process issue was never alleged to be nor considered as a "basis for judgment imposing personal liability".

Under the rationale of *International Shoe Co* v *Washington*, 326 US 310, 66 S Ct 154, 90 L Ed 94 (1945) as recently reaffirmed and expanded by *Shaffer* v *Heitner*, 433 US 187, 97 S Ct 2569, 53 L Ed 2d 683 (1977) the State of Michigan has sufficient minimum contracts to assert *in personam* jurisdiction over the defendant. The accident occurred within the State of Michigan. The plaintiff was a resident of the State of Michigan at the time of the accident. Allegedly the appellant was also a resident of the State of Michigan at the time of the accident. Both were insured by Detroit Automobile Inter-Insurance Exchange which does business in the State of Michigan and issued policies of insurance in Michigan covering both the plaintiff and defendant at the time of accident. Michigan clearly had jurisdiction over the person of the defendant. Service of process personally was not needed and was never asserted as a means of achieving personal jurisdiction.

The only issue decided by the Michigan Supreme Court was the requirement of notice by service of process, not jurisdiction. Appellant also misstates this aspect of the case by construing the Supreme Court's decisions as allowing substituted service upon an individual's liability insurer as the "only means of notice necessary to support a personal judgment against that individual." Far from being the *only* means of notice the Court Rule requires an exhaustion of any and all possible means of actual notice and substituted

service before application can be made to the Court for an Order allowing substituted service under MGCR 105.8.

This requirement of the Court Rule was affirmed by the Court's Opinion in *Krueger* v *Williams*, 410 Mich 144, 300 NW2d 910 (1981). The Court also mandated that before substituted service could be found to comply with due process requirements the trial court must require an affidavit of facts establishing a "truly diligent search for an absentee defendant" and that "no better alternative means of giving notice" are available (p. 38a) Appellant's mischaracterization of the Court's Opinion totally disregards the individual discretionary aspect of the Court Rule and the requirements for exercising that discretion on a case by case basis as set forth by the Court. It also ignores the exhaustion of all other means of substituted or actual service undertaken by the appellee in this case.

After filing her complaint plaintiff attempted diligently to locate the whereabouts of defendant Williams. Plaintiff hired an investigator through a law firm in the City of Grand Rapids where defendant was last known to reside. Affidavits submitted to the trial court indicated the efforts of the investigator including checking the last two known addresses in Grand Rapids and also the Post Office and Michigan Driver Records information for a current address. Upon finding an application for out of State license issued in Arkansas the Arkansas driver information file was obtained and a new address in Arkansas located.

Plaintiff attempted service of process by compliance with the Michigan Non-Resident Statute, MCLA 257.403; MSA 9.2103. However, because the letter was returned unopened this type of service was unavailable based upon *Tomkiw* v *Sauceda*, 374 Mich 381; 132 NW 2d 125 (1965) requiring a signed return receipt form to effectuate service of process under the Statute.

Additional investigators were hired and affidavits submitted showing a search for the defendant in Grand

Rapids, checking the divorce records at the County Clerk's office and County Department of Social Services records. Further leads were followed on the whereabouts of defendant through her son and acquaintenances and credit checks were made through local Credit Exchanges and the Secretary of State's Office. Based upon this evidence the Supreme Court found a "sufficient showing has been made to justify relieving a party from compliance with methods of service specifically prescribed by court rule or statute." (37a).

At the same time, the Court in the consolidated case of *Rodgers* v *David, supra*, held insufficient a verified Motion for Substituted service which failed to recite by specific fact, under oath, the efforts taken to locate the absentee defendant. The Court therefore reversed the decision in *Rodgers* remanding it to the trial court to determine if plaintiffs could satisfy the requirements of the local rule and demonstrate that they exercised due diligence but were unable to serve the defendant and that means better calculated to give actual notice other than that proposed were not feasible. In *Rodgers* the trial court had allowed service by publication.

The *Krueger* decision clearly indicates that service alone by publication or by service upon the insurer is never justified as the only means of notice necessary to commence litigation. Instead the Court Rule as applied by the Michigan Supreme Court requires all other means of substituted service in addition to an exhaustion of all possible means of direct personal service before a trial court can exercise its discretion to allow some other means of substituted service. *See, Felix* v *Felix*, 47 Mich App 744 (1973) (Service upon liability insurer denied for failure to exhaust other means of substituted service).

II. APPELLANT'S POSITION WOULD REQUIRE ACTUAL NOTICE IN ALL CASES TO ACHIEVE PERSONAL JURISDICTION.

The Michigan Rule allowing application to the trial court for a means of substituted service when personal service cannot be obtained is merely a recognition that actual notice and service of process cannot and need not be obtained in all cases. This court reached the same conclusion in *Mullane* v *Central Hanover Bank & Trust Co*, 339 US 306, 70 S Ct 652, 94 L Ed 865 (1950). It was this decision which the Michigan Court relied upon in authorizing the substituted service in the present case.

> It is important to note that *Mullane* acknowledged the possibility that the means chosen would never reach the defendant.
>
> "[I]t has been recognized that, in the case of persons missing or unkown, employment of an indirect and even a probably futile means of notification is all that the situation permits and creates no constitutional bar to a final decree foreclosing their rights." *Mullane*, *supra* 317."
>
> This language reflects an awareness that there may be situations in which an injured plaintiff will not be denied a cause of action even though a defendant cannot be found." (28a-29a)

The Michigan Court Rule also incorporates the due process test set forth in *Milliken* v *Meyer*, 311 US 457; 61 S Ct 339; 85 L Ed 278 (1940). That court held that the notice requirements of due process are satisfied if the method chosen is "reasonably calculated to give actual notice of the proceedings and an opportunity to be heard." In *Walker* v *Hutchinson*, 352 US 112, 77 S Ct 200; 1 L Ed 2d 178, 182 (1956) the court reiterated the requirements of adequate notice under the due process clause in cases of absentee,

missing, or unknown defendants. Referring to the *Mullane* decision the court quoted:

> We there called attention to the impossibility of setting up a rigid formula as to the kind of notice that must be given; notice required will vary with circumstances and conditions. We recognized that in some cases it might not be reasonably possible to give personal notice, for example where people are missing or unknown.

From the above cases it is clear due process requirements of the 14th Amendment do not require actual notice in the case of absentee or missing defendants. What is required "is the procedure best calculated to give notice under the particular circumstance." In this case the court exercised its discretion and concluded that notice upon the defendant's insurer was the best means feasible to give notice under the circumstances of this case. The court did not adopt rigid and fixed formulas and did not hold that service upon an insurer in any other case was valid or consistent with due process.

To accept defendant's argument this Court would be required to interpret due process as requiring actual notice in all cases. Whether plaintiff proceeds upon substituted service by serving the insurer or by publication the effect upon the defendant insurance company is the same. Defendant would as vigorously oppose service by publication if it were approved in the *Krueger* case as it is opposing service upon the defendant's liability insurer. The objection to such substituted service in either case is the lack of adequate notice. It is instructive to note that the defendant, although present at all hearings in the Circuit Court, the Court of Appeals and the Supreme Court at no time ventured to suggest a means of substituted service which was better calculated to give actual notice. The Plaintiff requested substituted service not only by serving the insurance carrier, but also by any other means the court saw desireable

or better calculated to give actual notice under the circumstances. Plaintiff requested service by publication or any other means the defendant or the court would suggest.

The issue is whether the due process clause should be used to allow a defendant to successfully evade personal service of process and therefore defeat a plaintiff's right to proceed with her cause of action and be compensated for negligently inflicted injuries. Defendant's contention that the due process clause requires this inequitable result cannot withstand scrutiny.

In *Olberding* v *Illinois Central R Co,* 346 US 338; 341; 745 S Ct 83; 98 L Ed 39, (1953) this court noted that:

> The potentialities of damage by a motorist, in a population as mobile as ours, are such that those whom he injures must have opportunities of redress against him provided only that he is afforded an opportunity to defend himself.

This observation is more true today. Since 1953 the use of the automobile has increased tremendously.

> If the courts deny a chance for recovery in the instances where the defendant cannot be personally served, many an injured plaintiff will go without recompense and the courts would, as a practical matter, be rewarding the defendant who absented himself. *Note, Civil Procedure–Constitutionality Of Constructive Service of Process On Missing Defendants,* 48 NC L Rev. 616, 619 (1970).

The effects of the atuomobile in a mobile society upon the due process requirement of notice was recently noted by this court in *Shaffer* v *Heitner,* 433 US 186, 97 S Ct 250, 53 L Ed 2d 683, 696 (1977).

> The advent of automobiles, with the con committant increase in the incidence of individuals causing injury in

> States where they were not subject to in personam actions under *Pennoyer*, required further moderation of the territorial limits on jurisdictional power. This modification, like the accommodation to the realities of interstate corporate activities, was accomplished by use of legal fiction that left the conceptual structure established in *Pennoyer* theoretically unaltered.

It was the same factor which the Michigan Supreme Court relied upon in allowing substituted service to preserve the plaintiff's cause of action against the absent defendant in *Krueger*. The court found that the rule allowing application to the trial court for substituted service was consistent with the State's interest in providing its citizens with a means of civil redress in view of an ever mobile society:

> The rule adopts a liberal approach to service of process which recognizes the mobility of contemporary society and the state's interest in providing recompense for injured plaintiffs. (28a).

Defendant, faced with the consistent rulings of this court and the expanding nature of the due process clause over the past 20 years attempts to distinguish *Mullane* and its progeny on the basis of property versus human rights. Defendant's distinctions are not only illogical but abhorent to the very nature of the judicial system as a means of settling civil wrongs and providing civil redress for intentional or negligently inflicted injuries.

Defendant contends that *Mullane* can be distinguished because it involved the cessation of property rights which defendant views as "a systemic necessity." It is interesting that this argument follows the decision of *Shaffer* v *Heitner*, *supra*, in which this court did away with the *Pennoyer* distinction between *in rem* and *in personam* jurisdiction requiring a finding of minimum contacts to assert either. Thus, at a time when this Court is moving ahead by abolishing the distinctions between *in rem* and *in personam*

jurisdiction defendant argues that that distinction should be reincarnated for the notice aspect of due process.

Defendant's argument that the state's interest in providing civil redress for its citizens who suffer injury at the hands of negligent defendants is "by no means vital in the same sense as the ability to determine interests in property or other matters" is not only illogical but contrary to the purpose and spirit of the Constitution in protecting individual liberties and creating a judicial branch of the government to provide its citizens with a means of civil redress. Michigan at least has recognized that interest in life is paramount to interest in property and that the State's interest in protecting its citizens is paramount to the State's interest in protecting its trust funds. Because a State chooses to regard its citizenry and their wellbeing as vital far and above property interests is no reason to abolish over 20 years of due process evolution and precedent. At the very least, the health and wellbeing of Esther Krueger is equal to and deserves the same due process protection as the property interests of Detroit Automobile Inter-Insurance Exchange. If the due process clause permits litigation to protect appellant's "systemically vital" property interest in a policy of insurance, it must necessarily provide the same means to preserve the plaintiff's life and wellbeing.

In reaching its decision the Michigan Supreme Court had the benefit of well-reasoned decisions from the jurisdictions of New York and New Jersey. The court relied upon and affirmed the balancing rationale used by the highest courts in those jurisdictions as providing a logical well reasoned resolution to the issue of whether the defendant should be allowed to avoid responsibility by absenting himself and thus defeating a plaintiff's right to relief. *Feuchtbaum* v *Constantini*, 59 NJ 167, 280 A 2d 161 (1971); *Dobkin* v *Chapman*, 21 NY 2d 490; 236 NE 2d 451 (1968). The court also took notice of the decision of *Manley* v *Nelson*, 50 Ha 484, 443 P 2d 158, cert denied sub nom *Soska* v *Manganaro*, 394 US 573, 89 S Ct 1299, 22 L Ed 2d

555 (1969). In that case the Hawaii Supreme Court upheld substituted service upon a non-resident defendant driver by publication. This court saw no reason to review that decision.

Defendant has attempted to distinguish and challenge the reasoning of these cases on appeal, but to no avail.

Defendant admits receipt of actual notice is not required in each instance. (Brief p. 18). However, as previously noted defendant fails to suggest what alternative means of substituted service would be better calculated to give actual notice than the means suggested by plaintiff and approved by the Supreme Court. Instead, defendant contends there is no reason to expect that it, as the defendant's insurer, would be more successful in locating the absent defendant than the plaintiff. Such an argument overlooks the fact the defendant is a multi-million dollar corporation with offices in virtually every major city in Michigan and the Mid-West and does business in a number of the states in this country. Indeed, some insurers have offices and do business in every state and major city in the country. To suggest that it would have no better means at hand of discovering or investigating the whereabouts of one of its insureds as would a private citizen stretches credibility. Secondly, defendant asserts that its interest in finding the defendant would not exist, but for the Michigan Supreme Court's decision in this case. This is an interesting admission to make when one considers that the defendant was actively engaged in negotiations and settlement of the Williams' claim. At the very minimum the defendant would have a right to be advised of the negotiations being undertaken by her insurer and the fiduciary relationship between the defendant and her insurer would mandate some communication. The Supreme Court noted that it was this obligation and this interest that the insurer had in regard to its insured, Alice Williams. (32a). Regardless of whether substituted service was authorized, it is clear that DAIIE had an obligation to defend and to represent the defendant in negotiations.

A balancing of the Plaintiff's needs, the public interest, the reasonableness of the plaintiff's efforts, and the safeguards to protect the defendant's interest as weighed by the Supreme Court in Michigan clearly mandate that some type of substituted service short of actual notice be authorized to allow plaintiff to proceed with her cause of action. The public interest and recognition of a citizen's right to seek damages for injuries and be compensated for those inuuries caused by the negligent or intentional acts of another are unquestioned. Indeed, in Michigan with the adoption of No-Fault Insurance every driver is required to be insured before he or she is allowed to operate an automobile. Insurance is required not for the protection of the negligent driver but for the protection of the citizen he injures. The mandatory insurance requirements of the No-Fault Act are but another expression of Michigan's public recognition that an injured party should be assured of a means and source of compensation in the event of negligently sustained injuries.

The public interest would best be protected by discouraging evasion of service of process whether deliberate or inadvertant. In this case there can be no question that Alice Williams recognized she was in an accident and in fact notified her insurance company DAIIE. It was the defendant who moved without a forwarding address and failed to take any efforts whatsoever to contact or notify her insurer or the plaintiff concerning the accident or possible claims arising out of it.

Additionally the public has an interest in encouraging insurers to keep in contact with their insureds especially after claims are made or accidents reported. In this case DAIIE made no efforts to keep in contact with its insured after the accident even though it openly and continuously negotiated with the plaintiff until the Statute of Limitations had almost run. It was only after the Statute of Limitations had in fact expired that DAIIE attempted to contact Alice Williams by placing a telephone call to her at her last

known address. These facts somewhat weaken the defendant's belated offer of compromise by allowing the Statute of Limitations to be tolled indefinitely until the defendant is located.

Service of process upon defendant's insurer under the facts and circumstances of this case is the means best calculated to give actual notice of the proceedings to the defendant. If it is not, plaintiff requests that DAIIE suggest a means better calculated to give notice and plaintiff will procure substituted service in that manner.

The purest of fiction in this case is that the defendant's insurer DAIIE is at all concerned with protecting the rights of Alice J. Williams. Defendant's insurer is concerned only with protecting its rights in a policy issued to Alice J. Williams. Thus, DAIIE does not offer a better means of substituted service and notice to defendant Williams, but insists that plaintiff cannot recover. DAIIE has for the past 10 years taken no action to locate Alice Williams other than one telephone call 3 years after the accident. To adopt a policy of encouraging insurers to lose contact with their insureds and fostering the situation in which that insurer can gain economic benefits if its insured can effectively evade service of process is contrary to the public interest, fundemental fairness and due process guaranteed by the 14th Amendment.

CONCLUSION

The issues sought to be reviewed in the present case do not involve substantial Federal questions. This court has in the past refused to consider the same arguments raised which concern only the giving of notice and not the scope of jurisdiction. Given the firm basis of jurisdiction in Michigan over the defendant due process requires only the best means calculated to give actual notice of the proceedings be utilized.

RELIEF REQUESTED

Wherefore Defendant-Appellee requests this court to affirm the judgment of the Michigan Supreme Court and/or in the alternative dismiss the present appeal or deny certiorari. Appellee requests costs to be taxed.

Respectfully submitted,
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